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IN THE

Supreme Court of The United States

OCTOBER TERM, 1979

No. 79-.....

JOHN M. BRYANT, et al.,
Petitioners,

vs.

BEN YELLEN, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The landowner-defendants below, on behalf of themselves and all other individuals whose farms in the Imperial Valley of California exceed 160 acres, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding.[1]

OPINIONS BELOW

The principal opinion of the District Court appears at 322 F.Supp. 11 (S.D.Cal. 1971). The principal opinion of

1. The individual landowner-defendants are John M. Bryant, Robert C. Brown, Harold Brockman, Stephen Elmore, Clara Maria Gutierrez, John Kubler and Charles Nilson. Respondents are Ben Yellen and 122 other individuals (hereinafter "respondents"). The State of California and the Imperial Irrigation District are non-adverse respondents designated pursuant to Rule 21(b)(4) of this Court's Rules. The United States was plaintiff in the District Court, but elected not to appeal from the District Court's judgment, and is therefore not a party to the proceedings in this Court.

the Court of Appeals, reversing the District Court, appears at 559 F.2d 509 (1977). The order of the District Court denying respondents leave to intervene for purposes of appeal is unreported. The order of the Court of Appeals allowing intervention by respondents was not published, but appears as an Appendix to the Court of Appeals' decision on the merits, 559 F.2d at 543. The opinion of the Court of Appeals on petition for rehearing appears at 595 F.2d 525 (1979). The opinion of the Superior Court of the State of California in *Hewes v. All Persons* (No. 15460, Superior Court, Imperial County, 1933) is unreported. Copies of all these opinions and orders are in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 18, 1977. A timely petition for rehearing was filed on September 15, 1977 and was denied on April 23, 1979. On July 18, 1979, Mr. Justice Stevens extended until September 14, 1979, petitioners' time to file a petition for certiorari. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals' denial of full faith and credit to the *in rem* judgment of the California court in *Hewes v. All Persons* violates basic principles of federalism articulated in *California v. United States,* 438 U.S. 645 (1978), by nullifying state law procedures designed to achieve final and binding determination of irrigation district obligations and water rights?

2. Whether denial of irrigation water to the 233,000 acres of Imperial Valley farmland in ownerships exceeding 160 acres will negate this Court's decrees in *Arizona v. California,* 373 U.S. 546 (1963), 376 U.S. 340 (1964), 439 U.S. 419 (1979), by denying beneficial use of water to the very lands for which the District's present perfected rights in Colorado River water were recognized by the Boulder Canyon Project Act and this Court?

3. Whether the Court of Appeals violated the standard prescribed by this Court for judicial review of longstanding administrative constructions when it accorded no weight to an administrative interpretation of almost 50 years' standing, and held, contrary thereto, that the Boulder Canyon Project Act of 1928 requires denial of irrigation water to all farmlands in the Imperial Valley of California which exceed 160 acres in single ownership?

4. Whether the Court of Appeals violated the requirements of Article III by entering a judgment that will radically alter the economy and social structure of an entire region of the United States at the behest of parties who, by the same court's own opinion, were shown not to have standing under repeated decisions of this Court?

STATUTORY PROVISIONS INVOLVED

Boulder Canyon Project Act, 45 Stat. 1057, 43 U.S.C. § 617 *et seq.*

Reclamation Act of 1902, §§ 1, 3-5, 8, 10, 32 Stat. 388, 43 U.S.C. §§ 372, 373, 383, 391, 416, 419, 431, 432, 434, 439.

Omnibus Adjustment Act of 1926, § 46, 44 Stat. 649, 43 U.S.C. § 423e.

Reclamation Extension Act of 1914, 38 Stat. 686, 43 U.S.C. § 418.

Colorado River Compact, 70 Cong.Rec. 324 (1928).

California Irrigation District Act of 1897, § 68, 1897 Cal. Stat. 254, 276.

California Irrigation District Act of 1917, § 3, 1917 Cal. Stat. 243, 245.

28 U.S.C. § 1738.

STATEMENT OF THE CASE

This case poses fundamental issues regarding the duty of federal courts to respect state law arrangements governing vital water rights and to accord full faith and credit to state court judgments, the meaning of this Court's decision and decrees in *Arizona v. California,* 373 U.S. 546 (1963), 376 U.S. 340 (1964), 439 U.S. 419 (1979), and the limits of judicial power to overturn longstanding administrative constructions of important federal statutes. The issues have far-reaching impact in terms of federal jurisprudence and are of critical importance to the water laws of the Western States.

At issue is whether the Boulder Canyon Project Act of 1928 incorporates provisions of federal reclamation law which would impose limitations on the maximum acreage of farms irrigated with Colorado River water. The Project Act authorized construction of Hoover Dam and, in addition, authorized construction of a canal on American soil to deliver water from the Colorado River to farms in the Imperial Valley of California. Those farms were irrigated with Colorado River water from 1901 through 1942 using a privately-constructed canal that ran partly through Mexico. Shortly after passage of the Project Act, a question arose as to whether provisions in general reclamation law limiting farms to 160 acres were made applicable by the Project Act to farms in the Imperial Valley. The Secretary of the Interior ruled in 1933 that the Project Act does not subject Imperial Valley farms to acreage limitation and, in an *in rem* proceeding which the federal government caused to be instituted in 1933, a decree was entered by the California courts confirming that acreage limitations are not made applicable to privately owned farmlands in the Imperial Valley. *Hewes v. All Persons,* App. 105a. This interpretation of the law prevailed for decades, and generations of farmers acquired lands and devoted their lives to developing those lands in reliance on that settled construction of federal law.

The District Court, after a full trial, upheld the longstanding construction of the Project Act. In the decision below, a panel of the Ninth Circuit overturned the District

Court and the longstanding construction, and decreed that the Act requires denial of Colorado River water to the majority of farmlands in the Imperial Valley in their current ownerships. In so doing, the Ninth Circuit brushed aside the judgment of the California courts in *Hewes,* which under California law bars respondents and all other persons from relitigating the issues decided in 1933, and thereby undermined a critical component of the statutory scheme established by California and the other Western States for securing early binding determinations fixing water rights and defining irrigation district obligations. Likewise, the Court of Appeals undermined this Court's decision and decrees in *Arizona v. California, supra.* And, in its eagerness to decide the merits of this controversy, the Court of Appeals strained to grant standing to post-judgment intervenors who have sustained no particularized injury and who will not benefit from the court's abrupt reversal of the settled interpretation of the Act.

Results such as these and the principles at stake merit the attention of this Court.

Proceedings Below, Parties, and Jurisdictional Matters. This action was brought by the United States against Imperial Irrigation District on January 11, 1967. The complaint alleged a new construction of the Boulder Canyon Project Act by a Solicitor of the Department of the Interior, after 40 years of contrary interpretation, and sought a declaration pursuant to that reinterpretation that the District "is bound by the land limitation provisions of reclamation law in the delivery of Colorado River water to all privately owned lands." I CR 9.[1] The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §§ 1331 and 1345. Petitioners were permitted to intervene as defendants both individually and as representatives of all persons whose farms in the District exceed 160 acres in single ownership. I CR 12. The State of California was allowed to intervene as a defendant. II CR 1.

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1. References to "CR" indicate the Clerk's Record in the Court of Appeals. References to "LX-" indicate exhibits introduced by petitioners in the District Court.

On January 5, 1971, the District Court rendered a decision holding that "the land limitation provisions of reclamation law have no application to privately owned lands lying within Imperial Irrigation District." 322 F. Supp. at 27; App. 72a. Judgment was entered for defendants on February 9, 1971. I CR 125.

Prior to expiration of the time for appeal, the Department of the Interior recommended against an appeal and the Department of Justice concurred in that decision. Solicitor General Griswold explained that he had "considered the matter carefully and thoroughly . . . over a considerable period of time" and had "become convinced that (a) we would not win the case in the court of appeals, and (b) we should not win it." 117 *Cong. Rec.* S 21299.

On March 18, 1971, respondents moved to intervene to prosecute an appeal. II CR 47. Respondents alleged as their sole interest in this case a desire to purchase farmland in the Imperial Valley. II CR 53-54. They alleged only that they were unable to purchase land at prevailing market prices. They did *not* allege, then or subsequently, what price they could afford to pay or whether imposition of acreage limitations would result in farmland prices they could afford to pay. Their motion to intervene was denied on March 29, 1971. App. 101a. On April 5, 1971, they noticed an appeal from the order denying intervention, and filed a "protective" notice of appeal from the decision on the merits. I CR 205.

On August 6, 1973, a panel of the Ninth Circuit issued an order permitting respondents' intervention to prosecute an appeal, not on the basis of Rule 24, but on grounds of judicial administration. App. 56a-57a. The Court of Appeals rendered its principal decision on August 18, 1977. First, the Court ruled that respondents had standing to litigate an appeal in this case. Then, the Court reversed the judgment of the District Court on the merits. Timely petitions for rehearing were filed by petitioners, the District and the State of California, but were eventually denied by the Ninth Circuit panel on April 23, 1979.

Early Settlement and Development of Imperial Valley. The Imperial Valley occupies the Southeast corner of California near its border with Mexico and Arizona. A desolate, uninhabitable desert in its natural state, the Valley lies below sea level, 50 miles west of the Colorado River. In the second half of the nineteenth century, a group of Californians conceived the plan of diverting water from the mainstream of the Colorado River and transporting it by gravity flow to the Imperial Valley.[1] In the 1890's they initiated appropriations of the water of the river in accordance with state[2] and federal[3] law, and in early 1900 they commenced digging a diversion canal, partly in Mexico and partly in the United States. For much of its length the canal followed the channel of a stream in Mexico called the Alamo River; hence the canal became known as the "Alamo Canal." The Alamo Canal was completed and water diversions commenced in July 1901. The flow of water to the desert sparked unprecedented settlement, and by 1920, there were 43,453 residents in the Valley and 414,720 acres were under irrigation.

The General Reclamation Laws. On June 17, 1902, Congress passed the National Reclamation Act with the hope that other areas in the West would be able, with federal assistance, to achieve what was then being accomplished with private resources in Imperial Valley. 32 Stat. 388 *et seq.* The Act set aside the proceeds from future sales of public lands in the 16 Western states and territories to finance "the construction and maintenance of irrigation works . . . for the reclamation of arid and semi-arid lands in the said States and Territories." 43 U.S.C. § 391.

During the years when Imperial Valley was being developed with outstanding success, government projects financed under the 1902 Reclamation Act were approaching the brink of financial failure. One problem was that much of the arid land in project areas was held in large tracts for speculative investment. Although § 5 of the 1902 Act

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1. This early history of Imperial Valley's development is recounted in this Court's opinion in *Arizona v. California*, 373 U.S. 546, 552-553 (1963). See generally Moeller, *Phil Swing and Boulder Dam* (1971).

2. Cal. Civ. Code § 1415 (1872).

3. *Rev. Stat.* 2239, 43 U.S.C. § 661.

prohibited the sale of water rights by the government to privately-owned lands in excess of 160-acre ownerships, this did not prevent the owners of undeveloped large tracts from holding them and selling them in 160-acre parcels to settlers at high prices reflecting the value of water which would be made available to the settlers through government facilities. As a result, settlers spent all of their capital making down payments for land, incurred huge mortgage obligations, and were unable to finance the costs of changing their raw land into productive farmland. Settlement and irrigation development proceeded slowly, and most settlers were unable to meet their repayment obligations for the water rights they had purchased from the government.

These problems led to amendments to the 1902 Act designed to put the reclamation program on a sound financial footing, to remove barriers to settlement and to encourage conversion of dry lands into irrigated farms. Section 46 of the Omnibus Adjustment Act of 1926 supplemented the 160-acre limitation contained in § 5 of the 1902 Act by prohibiting the sale of dry land to settlers at inflated prices and by securing the breakup of large undeveloped tracts into 160-acre parcels available for purchase by settlers at prices approved by the Secretary.

The Boulder Canyon Project Act. The problems plaguing the federal reclamation program were not present in Imperial Valley, where full settlement and development had already been achieved. An entirely different set of problems had arisen in the Valley, and these led to the Boulder Canyon Project Act.

In 1905, the Colorado River had breached its channel and, passing through the irrigation canal previously built, had flooded Imperial Valley. This breach was finally closed in 1907, but the 50,000 settlers in the Valley faced the ever-present threat of a recurrence. Other problems arose from the fact that operation of the Alamo Canal was exposed to difficulties whenever domestic conditions in Mexico became unsettled. These difficulties generated hopes within this country that someday there would be a canal wholly within the United States — an all-American canal. In 1919, the Department of the Interior issued a report

recommending construction of an all-American canal to the Imperial Valley, and also of a large storage reservoir in the mainstream of the Colorado to control the erratic and often destructive flow of the river. Congress directed investigation of such a project, 41 Stat. 600 (1920), and pursuant thereto the Department issued a Report in 1922, recommending that the federal government construct not only an all-American canal but also a dam and reservoir at Boulder Canyon. S. Doc. No. 142, 67th Cong., 2d Sess. (1922).

Given the prospect of a national project on the Colorado River, the seven states located in the river's basin sought and were granted congressional consent to negotiate and enter into a compact for the "equitable division and apportionment . . . of the water supply of the Colorado River." 42 Stat. 171 (1921). After a year of negotiations, the seven states reached an agreement at Santa Fe, New Mexico, on November 24, 1922. The agreement, known as the Colorado River Compact, divided the entire basin into two parts, the Upper Basin and the Lower Basin, and apportioned to each basin 7,500,000 acre feet of water a year from the Colorado River System. 70 *Cong. Rec.* 324 (1928).

During the last negotiating sessions in Santa Fe, representatives of the Imperial Valley pressed for inclusion in the Compact of language specifically protecting their appropriative rights to the quantities of water they had been diverting from the River since 1901. As a result, and with the Imperial Valley in mind,[1] Article VIII of the Compact was drafted, recognizing "present perfected rights" to water from the river and requiring that such rights "be satisfied" from any storage facility constructed on the river.

Between 1922 and 1928, Congressman Phil Swing, representative from the Imperial Valley, and Senator Hiram Johnson of California made attempts in each session to secure enactment of legislation authorizing construction of a dam on the Colorado and an all-American canal. The last of the Swing-Johnson bills was enacted as the Boulder

1. *Hearings Pursuant to S.Res. 320,* Sen. Comm. on Irr. & Recl., 68th Cong., 2d Sess. 678 (1925), LX-DD(C).

Canyon Project Act in December 1928. 45 Stat. 1057. Section 6 of the Act explicitly directed the "satisfaction of present perfected rights in pursuance of Article VIII of . . . [the] Colorado River Compact. . . ." 43 U.S.C. § 617e.

At the time the Project Act took effect on June 25, 1929, irrigation development and settlement in the Imperial Valley had been virtually completed. The District then operated a fully developed distribution system consisting of 1,700 miles of main and lateral canals, as compared with approximately 1,650 miles of canals operated today. II CR 15. Its farmers were irrigating approximately 424,000 acres, some 13,000 less than today, II CR 23-24, and the population of the Valley was 61,000.

The All-American Canal Contract. Following passage of the Project Act, the Secretary of the Interior commenced negotiations with the Imperial Irrigation District for a contract, as required by § 5 of the Project Act, obligating the District to repay its allocated portion of the cost of constructing the All-American Canal. Early in the negotiations, a question arose as to whether the Project Act made the acreage limitation law applicable to waters delivered through the canal, for if it did the contract would have had to have included elaborate provisions for the breakup and disposition of farms exceeding 160 acres, as required by § 46 of the 1926 Omnibus Adjustment Act. The representatives of the Department of the Interior concluded that the Project Act did not impose the acreage limitation provisions of general reclamation law, and the elaborate contractual provisions used by the Department in § 46 contracts were deliberately excluded from the Contract which the Department negotiated with the District. The Contract was executed by the Secretary and the District on December 1, 1932. State law and the Contract required electoral approval, and in a special election conducted on January 16, 1933, the voters of the District approved the Contract, free of acreage limitation restrictions, by a margin of 4,947 to 729.

The Proceedings in *Hewes v. All Persons.* The federal government required the District to obtain a judgment confirming the validity of the Contract in accordance with

California law. Accordingly, the District brought an *in rem* action in the Superior Court for Imperial County, captioned *Hewes v. All Persons.* One landowner defendant in that proceeding, Charles T. Malan, attacked the Contract, alleging that § 5 of the 1902 Reclamation Act would apply so as to deprive him of the right to receive water for his lands in excess of 160 acres. LX-AT. On February 24, 1933, in specific response to this allegation in the *Hewes* case, Secretary of the Interior Ray Lyman Wilbur promulgated a letter ruling, holding that the Boulder Canyon Project Act does not make the land limitation provision of § 5 of the Reclamation Act applicable to privately owned lands in the District. LX-AO. Seven days later, the Assistant Commissioner and Chief Counsel of the Bureau of Reclamation issued a letter confirming that it was the Department's position that § 46 of the 1926 Act likewise did not apply to Imperial Valley under the terms of the Project Act. LX-AR.

On July 1, 1933, following the Wilbur ruling, judgment was rendered in the *Hewes* case confirming the validity and legality of the Contract. LX-BC. In its opinion, the court held that "Section 5 of the Reclamation Law does not apply" under the Project Act to lands in the Imperial Irrigation District. App. 124a-125a. The *Hewes* judgment became final on February 26, 1934 after dismissal of an appeal.

The Department of the Interior monitored the *Hewes* case closely, and, while the case was still pending, Wilbur's successor, Secretary Harold Ickes, ruled that under § 4(b) of the Project Act a final judgment had to be entered in the *Hewes* proceeding before any appropriations could be sought for construction of the All-American Canal. Once the judgment in *Hewes* became final, the Department submitted the Contract to Congress and appropriations issued during the succeeding years for construction of the canal.

Administrative Interpretation of the Project Act. Construction of the canal commenced in August 1934. The first deliveries of water through the canal were made in 1940, and in 1942 the District ceased using the Alamo Canal and ultimately relinquished all its interest in that facility. On

March 4, 1952, the Contract between the government and the District was amended and supplemented. No claim was made at that time that land use restrictions should be incorporated into the amended contract.

Throughout these years, the Department of the Interior consistently adhered to the Wilbur Ruling and kept Congress advised of that ruling. *E.g., Hearings on H.R. 3961,* 78th Cong., 2d Sess., Part IV, pp. 599, 764-65 (1944); *Hearings on S. 1425, S. 2541 and S. 3448,* 85th Cong., 2d Sess., Appendix C, pp. 7, 11, 19 (1958). In 1942, the Federal Land Bank, which was making loans on farm lands in the District, inquired as to whether mortgage loans on farms in the District could be jeopardized by imposition of land limitation provisions. Commissioner Page of the Bureau of Reclamation advised the Land Bank that in accordance with the 1933 Wilbur ruling and the decision in *Hewes v. All Persons,* it was the opinion of the Bureau of Reclamation that "the limitation does not apply to such lands." LX-BR. Assistant Reclamation Commissioner Warne took the same position before Congress. *Hearings on H.R. 3961, supra.* In 1948, Secretary of the Interior Krug reaffirmed the Wilbur ruling, and Solicitor White of the Department of the Interior concurred in that action. LX-BU, LX-CR. In 1958 similar action was taken by Secretary Seaton's solicitor, Elmer Bennett. LX-CS.

The Proceedings in *Arizona v. California.* In 1952 Arizona initiated litigation in this Court, seeking an apportionment of the water of the Colorado River. In 1963, this Court issued its decision, holding that the contracting powers granted the Secretary in § 5 of the Project Act vest him with broad authority to apportion the river's water among the Lower Basin states and among users within the states, subject to certain restrictions found in the Act. *Arizona v. California,* 373 U.S. 546. "One of the most significant" of such restrictions, stated the Court, is § 6's mandate, derived from Article VIII of the Colorado River Compact, requiring the Secretary "to satisfy present perfected rights." *Id.* at 584. In its decree, the Court enjoined the United States from operating the project facilities other than in accordance with the mandate of § 6, including the requirement for

"satisfaction of present perfected rights." 376 U.S. at 342. Further proceedings ensued in order to quantify such "present perfected rights." Early this year, on January 9, 1979, this Court issued its Supplemental Decree in *Arizona v. California,* providing that the Imperial Irrigation District's present perfected rights have a priority date of 1901 and amount to 2,600,000 acre feet of water annually or the quantity necessary to irrigate 424,145 acres, whichever is less. 439 U.S. 419, 58 L. Ed.2d 627, 633 (1979).

This Action. While the proceedings in *Arizona v. California* were taking their course, the within litigation arose, sparked by an opinion which was issued on December 31, 1964 by Frank Barry, then Solicitor of the Department of the Interior. 71 I.D. 496. Barry's opinion criticized the Department's longstanding adherence to the Wilbur Ruling and concluded that the Boulder Canyon Project Act should have been construed as expressing a congressional intention to make acreage limitation provisions in general reclamation law applicable to privately owned lands in Imperial Valley. After the District Court rejected Barry's opinion and confirmed the longstanding interpretation of the Project Act, the Solicitor General publicly acknowledged the correctness of the decision and announced that the government would not appeal. Respondents' intervention then ensued, leading ultimately to the decision of the Ninth Circuit panel below.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision, without any pretense of judicial restraint, forcibly brushes aside 50 years of history to arrive at an interpretation of the Boulder Canyon Project Act which will deny water to half the farmlands in the Imperial Valley of California and devastate the lives and property rights of all citizens of that region. The decision merits review by this Court, not only because of its terrible human consequences, but because it plays havoc with basic principles of federalism and federal law.

First, the court misapplied a provision of California water law in order to circumvent an *in rem* judgment rendered by the California courts in 1933, thereby nullifying the intended effect of California's 82-year-old system for judicial confirmation of irrigation district contracts with the United States. In so doing, the court below violated principles set forth in *California v. United States,* 438 U.S. 645 (1978), and just as clearly violated the obligation of federal courts, specifically mandated by 28 U.S.C. § 1738, to accord full faith and credit to the judgments of state courts. The court's decision not only undermines California law, but also casts doubt on similar statutory schemes in the other Western States.

Second, by holding that the Secretary of the Interior must deny water to over half of the Imperial Irrigation District's farmlands, the Ninth Circuit panel directly negated this Court's decision and decree in *Arizona v. California* which order the Secretary to satisfy the District's present perfected rights with water sufficient to irrigate all 424,145 acres of the District's farmlands.

Third, in blind pursuit of its latter-day revelation of historical truth, the court below did the opposite of what this Court has repeatedly commanded: it sought by every device of its considerable ingenuity to criticize the longstanding administrative construction instead of looking for a reasonable basis to support the conscientious practice of three generations of public servants. The court relentlessly and sometimes disingenuously resolved every doubt and uncertainty in favor of its chosen interpretation of the Project Act, refusing to acknowledge or give weight to the reasonable grounds that supported adherence to the Wilbur interpretation through the course of five administrations since the passage of the Act. By so doing, the Ninth Circuit panel caused precisely what the principle of deference to administrative construction is designed to prevent — a devastating and widespread disruption of property rights acquired and expectations formed in reliance on the presumed validity of the longstanding governmental practice.

Finally, the Court of Appeals exercised its judicial power in plain violation of Article III's standing limitation. After the United States government decided not to prosecute the case on appeal, the Ninth Circuit reached out to decide the merits solely at the behest of persons who do not have even an arguable claim to standing under this Court's decisions.

If the Ninth Circuit's decision is allowed to stand, the social and economic impact in the Imperial Valley will be catastrophic. Currently, the average size of farms in harvested cropland in the Valley is about 590 acres. Approximately 800 farms are operated in units exceeding 160 acres in size, and together they account for 91.5% of the lands cultivated in the Valley. II CR 20. More than half the land in the Valley, or approximately 233,000 acres, is land in excess of 160 acres per single ownership. II CR 18. These lands are cultivated by family farmers, not absentee corporate enterprises. Approximately 95% of the Valley's farms are family enterprises, and together they account for 93% of the net irrigable acreage in the Valley.[1]

In a very real sense, Imperial Valley's entire economy is dependent upon, and reflective of, the longstanding interpretation of the law which the Court of Appeals rejected. The contentions raised by respondents, and adopted by the Court of Appeals, were seemingly put to rest four decades ago when Secretary Wilbur made his ruling and when the decision in *Hewes v. All Persons* was rendered. Since then, thousands of individuals have planned their lives, ordered their affairs and invested their capital and labor in developing farming operations which would be wiped out if the administrative interpretations upon which they relied were now overturned. The losses which would be inflicted on these persons by a reversal of the past are enormous, and would necessarily result in severe economic and social dislocation throughout the Valley.

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1. *Acreage Limitations in Bureau of Reclamation Projects,* Hearings before Subcomm. on Public Lands and Resources of Senate Comm. on Energy and Natural Resources, 95th Cong., 2d Sess., Part 3, p. 436 (1978).

I. IN REFUSING TO ACCORD THE *HEWES* CONFIRMATION DECISION FULL FAITH AND CREDIT, THE COURT OF APPEALS NULLIFIED ONE OF THE ESSENTIAL ASPECTS OF CALIFORNIA'S IRRIGATION DISTRICT SYSTEM AND PLACED IN SUBSTANTIAL DOUBT THE STABILITY OF SIMILAR SCHEMES IN THE OTHER WESTERN STATES.

In *Hewes v. All Persons,* the California courts entered a judgment that the acreage limitation provisions of federal reclamation law do not apply to Imperial Valley under the terms of the Project Act. Under state law this judgment is "binding on the world at large." *Santa Barbara County Water Agency v. All Persons,* 47 Cal. 2d 699, 703, 306 P.2d 875, 878 (1957). The Court of Appeals refused to give the *Hewes* judgment the finality intended by state law. It avoided *Hewes* by asserting that the acreage limitation issue was "incidental and collateral to the judgment" and "was an interpretation of the terms of the contract that the [California] court was not entitled to make in a confirmation proceeding." 559 F.2d at 526, App. 24a. This holding is plainly wrong and denies full faith and credit to the *Hewes* judgment in violation of 28 U.S.C. § 1738.

But more is involved here than a simple misapplication of *res judicata* principles. By circumventing *Hewes,* the Court of Appeals nullified the primary purpose of the California irrigation district scheme. In that scheme, the *Hewes* judgment did not stand by itself; it was the culmination of an integral procedure designed to guarantee that the voters of Imperial Irrigation District would have the opportunity to approve the terms on which the District contracted with the federal government, and that once such approval was given, the obligations of the District would be fixed permanently by an *in rem* decree. By refusing to honor the decree that finalized the process, the court below rendered the whole procedure ineffectual, including the guarantee, intended by California law, of voter approval of the terms of the District's contract.

The impact of the panel's holding extends well beyond California. California's irrigation district statute has been used as a model by the other Western States.[1] In states using this scheme, the long-term stability of irrigation districts is secured by the integrity of the overall contracting system. Before a district can enter into a contract which will obligate its constituent landowners, an election to approve the contract must be held. Only then is the contract submitted for confirmation in a judicial proceeding in which "anyone interested" can challenge the contract on any ground. California Irrigation District Act of 1897, § 68, 1897 Cal.Stat. 254, 276; California Irrigation District Act of 1917, § 3, 1917 Cal.Stat. 243, 245. As a whole the procedure assures that the landowners, the contracting parties, and would-be bondholders know where they stand at the outset, and can order their affairs accordingly.

By avoiding the *Hewes* judgment and implying provisions into the All-American Canal contract that were intentionally excluded by the parties,[2] the Court of Appeals not only defeated the expectations of those who relied on the efficacy of the *Hewes* judgment, it denied the voters of Imperial Irrigation District their right to approve the contract in advance. As a practical matter, the careful frame-

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1. Ariz. Rev. Stat. §§ 45-1694D, 45-2169; Cal. Code of Civil Proc. §§ 860, 870; *see* former Cal. Water Code §§ 23225, 22670, 22671; Colo. Rev. Stat. §§ 37-44-145, 37-45-143, 37-46-131, 37-48-113; Idaho Code § 43-1808; *see* Idaho Code § 43-2204; Kan. Stat. § 42-721 (b); Mont. Rev. Code § 87-7-1957; Neb. Rev. Stat. § 46-1,151; Nev. Rev. Stat. §§ 539.305, 539.565, 539.567; N.Dak. Code § 61-24.2-12; Okla. Stat. Title 82, § 277.6(13); S.Dak. Code § 46-14-30; Tex. Stat. § 58.155; Utah Code §§ 73-7-48, 73-7-51; Wash. Code § 87.03.200, § 87.03.780; Wyo. Stat. § 41-7-602.

2. The Court of Appeals is mistaken in its assertion that "[t]here is no evidence that the Department reached a conclusion before entering the contract that the 160-acre limitation did not apply in the Imperial Valley." App. 46a. The Wilbur letter explicitly states:

> "Early in the negotiations leading to the All-American Canal contract the question was raised whether and to what extent the 160-acre limitation is applicable to land to be irrigated from this canal. Upon careful consideration the view was reached that this limitation does not apply to lands now cultivated and having a present water right." LX-AO.

work of governmental checks and balances embodied in California's statutory procedure for irrigation districts has been nullified. Such nullification repeats in another way the disregard for state water law that this Court condemned in *California v. United States*, 438 U.S. 645 (1978).

In *California v. United States*, the Ninth Circuit had held that the Reclamation Act bars California from implementing its statutory procedure for creation of appropriative water rights so as to impose conditions on the allocation of water to a federal reclamation project. This Court reversed, holding that "principles of comity and federalism," intended by Congress to be honored in the reclamation program, require the federal government to "defer to the substance, as well as the form, of state water law." *Id.* at 675. The same concern for "cooperative federalism" and the "need to observe state water law" (*id.* at 650, 678) dictate review of the Ninth Circuit's decision here.

The Ninth Circuit accomplished its *de facto* nullification of California's system for irrigation district contracts by a clumsy violation of hornbook rules of the law of judgments. The court hypothesized that the issue of acreage limitation was immaterial to the "validity" of the contract since a "decision that the Project Act incorporates the acreage limitations on private lands of the reclamation law into the contract would not make the contract invalid under federal law . . . or California law." 559 F.2d at 525; App. 23a. This hypothesis is dead wrong. The contract, as executed and approved by the voters, did not include any acreage limitation and divestiture provisions. If the state court had concluded (consistent with the opinion of the court below) that the Project Act incorporates § 46 of the 1926 Act, the contract's intentional exclusion of the § 46 provisions would have rendered it invalid under federal law. And under state law, the *Hewes* court could not have implied such provisions into the contract, contrary to the express intention of the contracting parties, because the voters of the District had never approved any such contractual obligations. The only action proper for the *Hewes* court would have been rejection of the original contract with the requirement that the entire statutory process — including voter approval — be repeated for a contract with the land limitation provisions expressly included.[1] Thus, the *Hewes* court was *required* to adjudicate the acreage limitation issue since the absence of an acreage limitation provision was critically material to a determination of the contract's validity.

The conclusion that the acreage limitation issue was an appropriate and necessary question for the *Hewes* court to adjudicate is confirmed by precedent. The California Supreme Court treats acreage limitation issues as questions properly adjudicated in confirmation proceedings, and the California Supreme Court adjudicates acreage limitation issues in irrigation district contract confirmation proceedings.[2] Indeed, this Court's decision in *Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. 275 (1958), was a review of acreage limitation questions arising in confirmation proceedings identical to *Hewes*. If the Ninth Circuit's preposterous assertions were correct, the holdings in the *Ivanhoe* litigation are mere *dicta* which any subsequent court can disregard.

The *Hewes* holding that the Project Act does not impose acreage limitation in Imperial Valley was correct on the merits for reasons too numerous to explore in this petition. The *res judicata* effect of *Hewes* does not depend, however, on agreement with that conclusion. Section 1738 of the Judicial Code requires that the judgment of the *Hewes* court be given full faith and credit, regardless of its reasoning. *United States v. Moser*, 266 U.S. 236 (1924).

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1. This is a critical distinction between the *Hewes* facts and the facts of *Ivanhoe v. All Persons* on which the Ninth Circuit purported to rely. In *Ivanhoe*, the contracts in issue did contain express acreage limitation provisions, and these provisions had obtained the requisite voter approval prior to judicial review. Thus, the *Ivanhoe* decisions did not purport to foist upon the voters of the Ivanhoe District contract limitations never submitted for their approval, much less to do so forty years after they had lost the practical option of rejecting the contract.

2. *Santa Barbara County Water Agency v. All Persons*, 47 Cal. 2d 699, 703, 306 P.2d 875, 878 (1957); *Ivanhoe Irr. Dist. v. All Persons*, 47 Cal. 2d 597, 606, 306 P.2d 824, 829 (1957).

Moreover, no federal interest is served by denying full faith and credit to the *Hewes* judgment. Just the opposite. *California v. United States* holds that federal reclamation practice should defer to and operate within important procedures of state water law absent a clear congressional directive to bypass such procedures. 438 U.S. at 673. Here, there is no explicit congressional directive to circumvent state confirmation proceedings. On the contrary, federal law has recognized state systems for judicial confirmation of irrigation district contracts, and provides for judicial validation of irrigation district contracts with the federal government in state proceedings. *See, e.g.*, Act of May 15, 1922, 43 U.S.C. § 511; 62 *Cong. Rec.* 3575, 3582.[1] Indeed, as noted above, the Department of the Interior explicitly required the District to obtain a confirmation judgment fixing the District's obligations under the All-American Canal contract, and Secretary Wilbur's successor, Secretary Ickes, ruled that appropriations for constructing the All-American Canal could not be sought until the *Hewes* proceedings were completed and the judgment final. Given this explicit federal recognition and utilization of the very procedures leading to the *Hewes* judgment, the principle of "cooperative federalism" mandated in *California v. United States* reinforces in the exact circumstances of this case what 28 U.S.C. § 1738 demands in the abstract — that full faith and credit should be accorded to the *Hewes* decision. Instead, the decision below negates the substance of California laws designed to protect the interests of the real people whose lives are affected by the All-American Canal contract, and undermines the certainty of confirmation judgments affecting irrigation district contracts in all the Western States.

1. In his statement to Congress advocating passage of the Act of May 15, 1922, the Secretary of the Interior described the state judicial proceedings contemplated by the Act: "The laws of all States provide for confirmation proceedings, jurisdiction over all persons being secured by publication, whereby the decree becomes conclusive upon all the world . . ." 62 *Cong. Rec.* 3588.

II. THE COURT OF APPEALS' DECISION WILL PRECLUDE SATISFACTION OF THE PRESENT PERFECTED WATER RIGHTS OF IMPERIAL IRRIGATION DISTRICT, CONTRARY TO THE COMMAND OF THIS COURT'S DECREE IN *ARIZONA v. CALIFORNIA*.

In *Arizona v. California*, 373 U.S. 546 (1963), this Court ruled that § 5 of the Project Act gives the Secretary of Interior broad discretion to allocate Colorado River water by contract among users in the Lower Basin states. *Id.* at 580. This power, however, is subject to certain limitations provided in the Act itself. In particular, § 6 of the Project Act is a "clear and unequivocal" limitation on the Secretary's § 5 contracting power (*id.* at 581) which "requires satisfaction of 'present perfected rights.'" *Id.* at 566. Such rights "are entitled to priority under the Act." *Id.* at 600. In short, § 6 is, as this Court emphasized,

> "One of the most significant limitations in the Act . . . ." *Id.* at 584.

And it means exactly what it says, *i.e.*,

> ". . . that the Secretary is required to satisfy present perfected rights, a matter of intense importance to those who had reduced their water rights to actual beneficial use at the time the Act became effective." *Id.*

When Congress enacted § 6, there was no doubt as to the identity of "those who had reduced their water rights to actual beneficial use." Article VIII of the Compact had been specifically drafted to protect the water rights of the landowners in Imperial Valley. *Hearings Pursuant to S.Res. 320,* Sen. Comm. on Irr. & Recl. 68th Cong., 2d Sess., p. 678 (1925). During the congressional hearings the term "present perfected rights" was consistently explained by reference to the "valid appropriations" of "the lands in Imperial Valley." *Hearings on H.R. 2903,* House Comm. on Irr. & Recl., 68th Cong., 1st Sess. 1769 (1924); *Hearings on H.R. 9826,* House Comm. on Irr. & Recl., 69th Cong., 1st Sess. 167 (1926).

In its decree in *Arizona v. California,* this Court defined a "perfected right" as a water right "acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works. . . ." 376 U.S. at 341. A "present perfected right" is a perfected right that existed as of the effective date of the Project Act. As of the effective date of the Project Act, 424,124 acres of land were under irrigation in Imperial Valley, using water from the Colorado River pursuant to vested rights, the perfection of which had been commenced in 1901. Under this Court's decree, the Imperial Irrigation District's present perfected rights are measured by the beneficial water usage on that specific acreage.[1] And, the Secretary of the Interior is forbidden to release water from Hoover Dam for irrigation without providing for satisfaction of those rights. *Id.*

If acreage limitation were to be applied in the Valley, the Secretary would be under a duty to cut off water to 233,000 of the 424,124 acres which account for and are the beneficiaries of the District's present perfected rights. As the District Court emphasized, such a concept of shutting off water to more than half the lands whose prior beneficial use of water is the measure of the District's present perfected rights cannot be squared with § 6's mandate and this Court's decree commanding full satisfaction of the District's present perfected rights. 322 F. Supp. at 18; App. 83a.

In order to sustain its chosen reading of the Project Act, the Ninth Circuit panel had to construct an argument purporting to reconcile the incompatibility between the Secretary's clear § 6 duty and the duty he would be under if § 46 of the 1926 Act were applicable to privately owned lands in the Valley. Seizing upon a provision in California law, which provides that *legal title* to irrigation water is

1. Thus, in a Supplemental Decree issued on January 9, 1979, this Court determined that the present perfected rights of Imperial Irrigation District amount to 2.6 million acre feet per year, or the quantity necessary to irrigate 424,124 acres, whichever is less, with a priority date of 1901. 439 U.S. 419; 58 L.Ed.2d 627, 633 (1979).

held by the District in trust for its constituent landowners, the Court devised a theory that the Secretary's § 6 duty is only owed to the District, as holder of the legal title to the Valley's present perfected rights, and that once water is formally delivered to the District, the Secretary could compel the District to withhold distribution of that water to 233,000 acres of its constituent farmland without in any way violating his § 6 duty. This hypertechnical theory would trivialize § 6's mandate for satisfaction of present perfected rights and make a travesty of the promise made to Imperial Valley's farmers in Article VIII of the Colorado River Compact.

It is an indisputable fact under California water law that while the legal title to water rights is held by a District, it holds title solely as a trustee for its constituent landowners who are the equitable beneficiaries of the rights. *Merchants National Bank of San Diego v. Escondido Irr. Dist.,* 144 Cal. 329, 334, 77 Pac. 937, 939 (1904). It is senseless to assume that when Congress mandated full satisfaction of the present perfected rights which are held by the District as trustee, it intended at the same time that the Secretary should compel this trustee to withhold the water from the very lands for which the rights are held in trust. The Congress which enacted § 6 of the Project Act was concerned about people — the landowners whose prior use of Colorado River water created the present perfected rights — not with legal fictions.

The decree in *Arizona v. California* requires that the Secretary honor the provisions of the Colorado River Compact that present perfected rights are to be "unimpaired." Token delivery of water to the District, where the District is prohibited from distributing that water to more than one-half of the acres entitled to its beneficial use, is "impairment," not "satisfaction," of those rights in any sane usage of those words.

To suggest otherwise is to suggest that the solemn pledges contained in the Colorado River Compact, in § 6 of the Project Act, and in the decree in *Arizona v. California* that present perfected rights would be honored —

pledges that this Court has said were of "intense importance to those who had reduced their water rights to actual beneficial use at the time the Project Act became effective"—were no more, in Justice Jackson's phrase, than a "teasing illusion like a munificent bequest in a pauper's will."[1] It does no credit to Congress or to government generally to find that it indulged in such pettifoggery.

III. THE COURT OF APPEALS' OPINION IS A WILLFUL VIOLATION OF THIS COURT'S DECISIONS REQUIRING JUDICIAL DEFERENCE TO LONGSTANDING ADMINISTRATIVE CONSTRUCTIONS.

This Court has always commanded the judiciary to accord every reasonable doubt to statutory constructions which underlie longstanding administrative practices. *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 457-58 (1978). Adherence to this principle is necessary "for the establishment and enforcement of justice . . . between the government and those who deal with it and put faith in the action of its constituted authorities. . . ." *United States v. Hill*, 120 U.S. 169, 182-83 (1887). In its opinion below, the Ninth Circuit panel disregarded this principle and did the exact opposite; it launched a relentless, unprincipled attack on the longstanding construction of the Boulder Canyon Project Act, fully aware that such assault would devastate important property rights and honest human expectations.

In quest of its chosen result, the Court of Appeals focused on the general references made in the Project Act to the reclamation law. Although none of these references mentions acreage limitation and although they are expressly subordinated to numerous specific provisions in the Act which are inconsistent with any notion of acreage limitation,[2]

1. *Edwards v. California*, 314 U.S. 160, 181 (1941) (concurring opinion).

2. See §§ 5, 6, 8(a), 9 and 13, and the District Court's analysis of these provisions, 322 F.Supp. at 18, App. 80a-84a.

the court peremptorily announced that "it is apparent" that acreage limitation applies because the statutory "language directly mandat[es] application of the excess lands provision of Section 46 to private lands in the Imperial Irrigation District." 559 F.2d at 527, App. 26a, 27a. The Ninth Circuit clearly violated this Court's dictates in opting for its own reading of a few of the Act's terms. This Court has repeatedly admonished that a settled administrative construction should not be overturned simply because it might be contrary to the reviewing court's "reading of the bare words of the statute." *FHA v. Darlington, Inc.*, 358 U.S. 84, 90 (1958). *Cf. Saxbe v. Bustos*, 419 U.S. 65, 74-75 (1974).

Under the decisions of this Court, a presumption of validity must be accorded contemporaneous administrative constructions, and that presumption can only be overcome by a showing that the statute is "so plain in its command" and "so clearly expressed as to exclude . . . argument in support" of the administrative construction. *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315 (1933); *Hewitt v. Schultz*, 180 U.S. 139, 156-57 (1901). Here, the Ninth Circuit did just the opposite. It reasoned that the interpretation it divined from the Act's bare words was unassailably valid unless foreclosed by overwhelmingly clear and "express" evidence to the contrary.

The court attempted to justify its upside-down approach by invoking a passing comment made by this Court in *Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. at 292, to the effect that Congress has always made exemptions from acreage limitation "by express enactment." As the District Court correctly pointed out, however, the practice mentioned in *Ivanhoe* did not commence until 1938, and thus cannot logically support *any* inference about the intent of a Congress that acted a decade earlier. 322 F.Supp. at 20, App. 85a. Moreover, the *Ivanhoe* comment was clearly not conceived by this Court as legitimizing reversal of the presumption of validity accorded longstanding administrative constructions. Indeed, the *Ivanhoe* Court invoked administrative construction to support its holding. 357 U.S. at 293. In *California v. United States*, 438 U.S. at 676, this Court warned against reading too much into "the unnecessarily

broad language of the Court's opinion in Ivanhoe," but that is just what the Court of Appeals did here.

Given its misreading of *Ivanhoe*, the panel below did not follow this Court's directive to inquire whether "the intention of Congress [was] . . . so clearly expressed as to exclude construction or argument" in support of the decades-old interpretation of the Boulder Canyon Project Act. *Hewitt v. Schultz*, 180 U.S. at 156-57. Instead, it turned the tables and inquired whether the intent of Congress was so clearly expressed as to evidence an "express enactment" excluding construction or argument in favor of the Court's reinterpretation of the Act.

This fundamental misdirection of approach permeates the Ninth Circuit panel's opinion. Instead of resolving doubts in favor of Secretary Wilbur's ruling, the Court engaged in an essentially captious, and sometimes disingenuous, attack on the Secretary's reasoning.[1] Instead of acknowledging the many reasonable arguments that can be made from the statutory language in support of the historical interpretation of the Act, the Court stretched in the other direction, and in the case of § 6's mandate for satisfaction of present

1. The court repeatedly belittles the Wilbur letter for addressing § 5 of the 1902 Act rather than § 46 of the 1926 Act. 559 F.2d at 537-39; App. 44a-46a. But since Secretary Wilbur's letter addressed Malan's allegation in *Hewes* regarding § 5, there was good reason to focus the analysis on § 5. Moreover, seven days after the Secretary's ruling, the Department issued a letter, under signature of Porter W. Dent, Assistant Commissioner and Chief Counsel of the Bureau of Reclamation, taking the position that the same principles discussed in the Wilbur letter applied to, and precluded application of, § 46 of the Omnibus Adjustment Act. LX-AR. The Court of Appeals relegated the Dent letter to a footnote, stating that "there is no claim that this letter should be considered as an administrative construction of the Project Act to which the courts should defer." 559 F.2d at 538 n.67, App. 46a-47a. That is a flagrant misstatement. Throughout the 12 years of this litigation, petitioners have consistently invoked Chief Counsel Dent's letter as being part and parcel of the Department's 1933 construction.

perfected rights, strained to contrive an interpretation consonant with its desired result. *See* 559 F.2d at 528-30, App. 29a-31a.

Nowhere is the court's misdirected bias more evident than in its treatment of the Project Act's legislative history, particularly the statements made in Committee hearings by Commissioner Mead and Congressman Swing. During the hearings on the Act, Congressman Swing, who was the Valley's congressman and the bill's chief sponsor, testified that the Act would *not* make acreage limitations contained in the reclamation law applicable in Imperial Valley. *Hearings on H.R. 6251*, 69th Cong., 1st Sess., pp. 32-33 (1926); LX-DD. Dr. Elwood Mead, the Commissioner of Reclamation and the Department of the Interior's chief witness in the hearings, stated that nothing in the Act would restrict the acreage of farm units in the Valley. *Hearings on H.R. 6251, supra.* On four occasions in 1927 and 1928, Senators intimately familiar with the reclamation law unsuccessfully proposed amendments that specifically would have imposed acreage limitations on privately owned lands in the Valley, as the Act specifically provided in § 9 with respect to public lands only. LX-CU; LX-DU; LX-DD(H); LX-DD(M). The Senate Report on the bill in 1928 was accompanied by a minority report which pointed out that the bill would not subject privately owned lands to a 160-acre limitation. S. Rep. No. 592, 70th Cong., 1st Sess., Part II, pp. 3, 5 and 26 (1928); LX-DD(J). During the Senate debates, Senators Hayden and Ashurst emphasized that the Act would not subject private lands to acreage limitations. 69 *Cong. Rec.* 7634-35, 9451, 10471, 10495; 70 *Cong. Rec.* 289. Most significantly, during the long course of congressional hearings and debates there was *no one*, whether supporter or opponent, who said that acreage limitation would apply in Imperial Valley under the Project Act as passed.

Rather than acknowledge the support found in this legislative history for argument in favor of the longstanding interpretation of the Act, the Court of Appeals stretched to discount the legislative evidence at every turn. The court's contrived explanation of the testimony by Congressman Swing and Commissioner Mead[1] is illustrative. During the 1926 hearings, Congressman Swing and Dr. Mead engaged in the following exchange with members of the House Committee on Irrigation and Reclamation:

"MR. SINNOTT. The present owner can occupy his present farm unit?

"DR MEAD. Yes, Sir.

"MR. SINNOTT. No matter what that might be?

"DR. MEAD. Yes.

"MR. SINNOTT. There is nothing in this bill requiring the landowner to sell the surplus over a farm unit of 160 acres at a price to be fixed by the Secretary, *as is now in the present reclamation law?*

"MR. SWING. No, Sir." *Hearings on H.R. 6251,* 69th Cong. 1st Sess. 33 (1926) (emphasis supplied).

Unable to reconcile this statement by the Act's author with its own theory of the Act's purpose, the Court of Appeals simply brushed Congressman Swing's statement aside with the observation that it "was not made with reference to any particular portion of the bill." 559 F.2d at 532, App. 36a. Then the court disingenuously side-stepped Dr.

1. There is no more persuasive voice on the policy of the federal reclamation program than Mead's. As this Court noted in *California v. United States,* 438 U.S. at 654 n.9, "Dr. Mead was a principal witness before Congress during the hearings on the Reclamation Act of 1902 and later became Commissioner of Reclamation, serving in that position from 1924 until his death in 1936." Lake Mead, the storage reservoir for Hoover Dam, honors his contributions to the Boulder Canyon Project.

Mead's testimony by hypothesizing that the Commissioner intended his remarks to mean that a 160-acre limitation would apply but that there would be no requirement for divestiture of lands exceeding 160 acres.[1]

Ultimately, the Court of Appeals capped its rejection of the legislative history with the following observation:

> "[T]he legislative history indicates that the problem did not receive the extended Congressional consideration that would be normally thought appropriate if an exemption to an important part of the reclamation law was being created." 559 F.2d at 535, App. 41a.

This reasoning not only resolves all doubt against, rather than in favor of, the historical construction of the Act, but it clearly overlooks a more likely inference to be drawn from the sparsity of comments about acreage limitation in the historical record — presumably, more extended discussion of the issue would have occurred if the Act had been construed as requiring breakup of the pattern of landownership and farming in the Imperial Valley which was then almost three decades old. Surely the many witnesses from the Imperial Valley who appeared before Congress urging passage of the Act would not have acquiesced in such a drastic measure without extensive protestation and debate.

In *United States v. Midwest Oil Co.,* 236 U.S. 459 (1915), this Court explained why the long-continued existence of an administrative interpretation should establish a strong legal presumption of its validity:

> "[G]overnment is a practical affair intended for practical men. Both officers, lawmakers and citizens naturally

1. The court attempted to justify this nonsensical translation of Dr. Mead's words by noting that § 46 of the 1926 Act was not enacted until two months later, falsely implying that there was "no applicable divestiture provision for excess lands" in the reclamation law at the time of Mead's testimony. 559 F.2d at 533, App. 37a. In point of truth, there was an applicable divestiture provision in the reclamation law at the time of Commissioner Mead's testimony, and Dr. Mead was obviously aware of it since it had been on the books for 12 years. It was § 12 of the Reclamation Extension Act of 1914, 38 Stat. 689; it is still in the law, 43 U.S.C. § 418.

adjust themselves to any long-continued action of the Executive Department — on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystalize into regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself — even when the validity of the practice is the subject of investigation." *Id.* at 472-73.

That "wise and quieting rule" was followed by the District Court, but ignored by the Court of Appeals. Unless this Court now intervenes, the Court of Appeals' decision will cause widespread social and economic loss to thousands who have ordered their lives and dealt with the government upon the faith of the historic interpretation of the Project Act.

It would be ironic indeed if the Reclamation Act of 1902, the purpose of which was to make "homes out of territory of the United States now practically uninhabited" (35 *Cong. Rec.* 6774), were to become the instrument of destruction of communities now 70 years old, and the means of forced resettlement of lands which have been settled and continuously farmed for more than four generations.

IV. IN REACHING OUT TO REVERSE A JUDGMENT THAT THE UNITED STATES DECIDED SHOULD NOT BE APPEALED, THE COURT OF APPEALS CLEARLY EXCEEDED THE LIMITS OF JUDICIAL POWER PRESCRIBED BY ARTICLE III OF THE CONSTITUTION.

Under this Court's decisions in *Warth v. Seldin,* 422 U.S. 490 (1975), and *Simon v. Eastern Kentucky Welfare Rights Org'n,* 426 U.S. 26 (1976), standing under Article III requires a showing that the purported litigant has sustained a "particularized injury" that resulted "in a concretely demonstrable way" from the violations alleged. *Warth v. Seldin,* 422 U.S. at 504. "Put otherwise, [the question is whether] the exercise of the Court's remedial powers would

redress the claimed injuries." *Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 74 (1978).

The *Warth* case addressed squarely the issue of what must be shown by a plaintiff who bases his claim of standing on the contention that, but for defendant's violation of law, plaintiff would have been able to purchase property. In *Warth,* petitioners based their claim of standing on the contention that they had been unable to buy houses in the village of Penfield because of allegedly restrictive and discriminatory zoning practices followed by the village. They alleged that each of them had made concrete efforts to purchase, and that their efforts had proven fruitless because the price of houses in Penfield was greater than they could afford. This Court held that petitioners lacked standing, on the ground that the facts alleged failed to show "an actionable causal relationship between Penfield's zoning practices and petitioners' asserted injury." 422 U.S. at 507. In particular, this Court said, the record was devoid

> "of any indication that [any contemplated housing project] would have satisfied petitioners' needs *at prices they could afford,* or that, were the court to remove the obstructions attributable to respondents, such relief would benefit petitioners. Indeed, petitioners' descriptions of their individual financial situations and housing needs suggest precisely the contrary — that their inability to reside in Penfield is the consequence of the economics of the area housing market, rather than of respondents' assertedly illegal acts." *Id.* at 506 (emphasis supplied).

Like petitioners in *Warth,* respondents here base their claim of standing on their alleged desire to purchase property — here, irrigated farmland — and allege that the current price of the property they desire to purchase exceeds their means. Like petitioners in *Warth,* however, respondents have entirely failed to allege that any relief the court could grant would make land available *at a price respondents could afford.* Respondents' showing here, indeed, is measurably inferior to the insufficient showing made in *Warth*: unlike petitioners in *Warth,* no respondent here alleged any effort, at any time, to purchase farmland in Imperial Irrigation District.

In support of their claim to standing in this case, respondents filed eleven short affidavits, ten of which were identically worded (except for the affiants' names and addresses) as follows:

> "1. I am one of the petitioners for Intervention in this action. I am also one of the plaintiffs in Civil Action No. 69-124 now pending in this Court, entitled, 'Ben Yellen, et al., Plaintiffs, vs. Walter J. Hickel, et al., Defendants'; the latter action is to compel the Secretary of the Interior to enforce the residency requirement of Section 5 of the Reclamation Act of 1902, 32 Stat. 389, 43 U.S.C.A. Section 431, against absentee landowners.
>
> "2. My address is. . . .
>
> "3. My occupation is agricultural worker.
>
> "4. I do not own farm land anywhere in the United States. I would like to own land of my own on which to engage in farming. I desire to purchase the excess lands currently being irrigated with federal reclamation water by the Imperial Irrigation District." I CR 172 *et seq.*

One affidavit, that of respondent Yellen, additionally stated:

> "5. If the Government had prevailed in this litigation, the Applicants and persons similarly situated would *attempt* to purchase to purchase [sic] the excess lands under the terms and conditions set by the Secretary of the Interior.
>
> "6. I am acquainted with the cost of land within the Imperial Irrigation District. Land that is without water has a market value and sells for approximately $25.00 to $50.00 per acre. Land that is irrigated with federal reclamation water by the Imperial Irrigation District has a value and sells for between $1200.00 to $1400.00 per acre."
>
> I CR 170 (emphasis supplied).

These meager statements do not show what price respondents could afford to pay for land or that there is any substantial likelihood that application of acreage limitations would result in prices they could afford and would pay. In short, there is no showing whatever that nonapplication of acreage limitations has thwarted respondents' "desire" to buy farmland or that enforcement of acreage limitation would result in gratification of their desire.

The Court of Appeals attempted to gloss over this deficiency by asserting that *if* respondents were to buy land in Imperial Valley they would have to pay prices higher than they would pay if § 46 applied to the private landowners in the area. 559 F.2d at 522, App. 16a. Thus, the Court of Appeals concluded that respondents' standing can be predicated solely on an interest in seeing land prices reduced generally, without requiring any proof of respondents' ability to purchase at those unspecified lower prices. Thus the court characterized respondents' interest as "an interest only in reducing land prices, not an interest in reducing land prices to any specific level." *Id.* That reasoning flies directly in the face of this Court's holding in *Warth v. Seldin* that standing cannot be established by the mere allegation of an interest in seeing current market prices reduced.

Article III's standing requirement is intended to foreclose the exercise of judicial power at the behest of partisans who have no stake in the issues presented for adjudication other than vindication of their individual notions of right and wrong. That purpose is particularly important in situations, such as this, where judicial power is invoked to reverse history, overturn longstanding legal interpretations and change a community's social and economic structure. Such extraordinarily Draconian objectives should not lightly be undertaken by the judiciary unless those seeking to invoke the judicial power can clearly establish the existence of standing.

Here, the Court of Appeals overreached the limits of its Article III power in acting at respondents' behest, and in so doing, it has rendered an advisory opinion which will have an incalculably disastrous effect on the citizens of the Imperial Valley. Such improvident and unnecessary exercise of judicial power is precisely what Article III is designed to prevent.

V. CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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